



1964

## Legal Idealism and Constitutional Law

James A. Gardner

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Constitutional Law Commons](#), [Jurisprudence Commons](#), and the [Legal History Commons](#)

---

### Recommended Citation

James A. Gardner, *Legal Idealism and Constitutional Law*, 10 Vill. L. Rev. 1 (1964).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol10/iss1/1>

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

# Villanova Law Review

VOLUME 10

FALL 1964

NUMBER 1

## LEGAL IDEALISM AND CONSTITUTIONAL LAW

By JAMES A. GARDNER\*

Now when we come to our attitude toward the universe I do not see any rational ground for demanding the superlative — for being dissatisfied unless we are assured that our truth is cosmic truth, if there is such a thing — that the ultimates of a little creature on this little earth are the last word of the unimaginable whole.\*\*

### I.

#### INTRODUCTION

THE OLDEST and most widely accepted theory of social control through law in western civilization is that of natural law. Beginning with the Greeks, the development of natural law as a way of thinking about law, what law is and the role of law in social control can be traced through the Romans, the medieval period, the early modern and the modern period. In the last three centuries it reached its period of greatest importance during the creative development of equity and natural law in the eighteenth century. We are now in a period of transition from the grand finale of the last great age of the natural law — which ended with the ideological ending of the nineteenth century — to something new and different, which promises to be another great period of creativity, wherein the law must endeavor to meet the unprecedented problems of the new era. If there is a revival of natural law going on at the present time, it is something different from that which has gone before, whether it be merely a kind of relative natural law or a critical theory of legal valuation which emphasizes the ideal or universal aspect of the law and endeavors to subsume and harmonize the positive law thereunder. This effort to achieve creativity through the revival of a new and vibrant jural idealism has been previously referred to by the writer, in a piece wherein he has en-

---

\* LL.B., 1948, Harvard; LL.M., 1958, Columbia; member of the Bar of California and the Bar of Illinois; now of the Orange County Bar, California.

\*\* Holmes, *Natural Law*, 32 HARV. L. REV. 40, 43 (1918).

deavored to show how the judges and lawyers should approach their tasks.<sup>1</sup> We are of course too close to our law of today to evaluate it properly, but we must constantly attempt to do this, and for each such attempt, there must be some kind of excursion into legal history. The present piece, written first, was necessary to an understanding of the later one, pointing the way, since the first task is to understand the nature of the need.

Our law reached its present state through stages of legal development of a more fixed or absolute, if not less idealistic, conception of the nature of things, including the principles of social control promulgated and enforced by politically organized society. The history of natural law has been previously written many times. The story of its development, in its ideological setting, together with its influence on political and legal institutions, constitutes the history of jurisprudence to this day. It continues to point up new lessons and insights for those who would attempt to understand the present state of our law, how it developed into what it is and how we should proceed through law as we face the tasks of the present and plan for those of the future. Hence, the further consideration of the history of natural law, even in minuscule form, may have some value, as each generation endeavors to reinterpret the past in the light of its own experiences and understanding. Each reinterpretation in turn adds new understanding. The very decisions themselves must be read and understood in the context in which they were written, the kind of thought *milieu* in which their authors lived, the major premises of their *Weltanschauung*. Here, emphasis will be placed on constitutional law in the jurisprudential context, because it approaches more nearly the law of general or universal character, creating a more general interest. The attempt to do this briefly, to give a thumbnail sketch and yet retain the essence and the central theme, is the objective sought.

Our law in the United States received its rich heritage from the politico-legal tradition of the common law and the classical natural law writers on the European continent. Both of these sources in turn owed their debt to Antiquity. How our law reached its present state of growth and development can be understood only in the light of this tradition. This is particularly true of the Supreme Court and its rather constant role in national policy-making. It is the purpose of this writer to sketch the historical content of the idealistic theories of law and to show how they have guided and influenced the growth and development of our constitutional law into the twentieth century.

---

1. Gardner, *The Supreme Court and Philosophy of Law*, 5 VILL. L. REV. 181 (1959).

## II.

### IDEALISM IN GRECO-ROMAN LAW

Philosophy of law as we know it began with the Greek thinkers of the fifth century B.C. Law was first identified with custom and convention. The Sophists saw in law a system for the control of the weak by the strong and therefore conceived it to be a measure of expediency. In seeking a more solid basis on which to rest the rules of social control, the social philosophers asked if it were not true that right was right by nature rather than by mere convention and enactment or expediency. The conclusion of their best thinkers, the one which was to have a lasting influence on western thought, was that man was a natural creature and that his basic rules of social control were laws analogous to the universal phenomena of physical nature. Aristotle advanced the concept of "natural justice" as that which is discoverable from nature and which remains constant — "that which everywhere has the same force and does not depend upon being received or not."<sup>2</sup> According to this view, true law is held to be right reason. Aristotle did not consider natural law and positive law as such but rather that which is just in itself by nature and that which derives its authority solely from convention and enactment.<sup>3</sup>

Particular law is that which each community lays down and applies to its own members. . . . Universal law is the law of nature. For there really is, as everyone to some extent divines, a natural justice and injustice that is binding on all men, even on those who have no association or covenant with each other.<sup>4</sup>

Thus the Greek philosophers distinguished between the just by nature, which is "unwritten, universal, eternal, and immutable," and the just by enactment, positive law, which is local and changeable.<sup>5</sup> The former is a higher law of which all man-made law is but a poor imitation. It is the "real" law running behind all mere man-made rules of law. This is implicit in the Platonic theory of Forms, and it was in this Platonic dualism that the conception of a dualism in the law, which Roman and later jurists have adopted when they sought for some standard by which to test the validity of existing positive laws, was born. The permanent contribution of Greek philosophy of law to the world is to be found in this distinction between mere rules of law and the "real" law which lies behind it.<sup>6</sup>

2. NICOMECHAN ETHICS Bk. V, 7 (Chase tr., 1911).

3. RHETORICA Bk. 1, Ch. 13, 1373b (Ross. tr., 1924).

4. *Ibid.*

5. NICOMECHAN ETHICS, *op. cit. supra* note 2.

6. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 26 (1922).

The end of law in its primitive state is to keep the peace. But as the Greeks advanced in civilization and began to speculate on the nature of law, they came to think of the maintenance of the general security in more comprehensive terms as preserved through the security of social institutions. They then perceived the end of law and the legal order to be the preservation of the social *status quo*, and law was a device to keep each man in his appointed groove in society and thus prevent friction with his fellow-men.

Greek law never got beyond the primitive stage, however. Due to the nature of the Greek polity, its systems of law were stunted in their natural growth and development, and there came to exist the anomaly of a primitive law in a more advanced cultural state of society. However, due to the sophistication of the Greek mind, a philosophy of law developed, and Greece went through a sort of equity and naturalization of the law. Law and morals were largely undifferentiated; hence, philosophy lent itself to a ready identification of the legal and the moral in juristic thought; and, in spite of their being written down, the rules of law were applied with a sort of individualized justice or equity in the citizens' assemblies, much in the manner and spirit of our modern jury trials. Thus, despite its comparatively undeveloped state in the period of maturity of Greek culture, Greek law maintained a fluidity which enabled it to furnish a philosophy for Roman law when the demand for it arose in the Roman law stage of equity and naturalization.<sup>7</sup>

The influence of Greek theories of law on Roman law had its most distinct expression in Stoicism. This was through the single fundamental assumption of Stoicism of the identity of natural law with reason and human nature. The Stoic philosophy refined Greek conceptions of law, making them broader, deeper and nobler. Whereas, Aristotle's "natural justice" was primarily a norm and guide for lawmakers, the *jus naturale* of the Stoics was the way of happiness of all men. The Supreme Legislator was Nature herself. Nature, human nature, and reason were one. Man, through his rational capacity, was directly participant with the Gods. It is a general legal ideal of a common law of all humanity, which is the law of reason and of nature. It is permeated by the great stoic principle of equality of all persons in the great court of Nature. It is a way of looking at things, a spirit of interpretation in the mind of judge and jurist. This new concept, arising on the ruins of the Greek city-state, was ethical rather than politico-legal, at once individualistic and cosmopolitan.

The formulation of the ethical concept of the Stoics was first adumbrated by Socrates. Whereas the Sophists proclaimed the idea of

---

7. See *id.* at Chs. 1-3, *passim*.

law as the rule of the strong over the weak, Socrates attacked this conception and endeavored to restore the authority of the law by putting an ethical base under it. He argued that the only way to attain permanent happiness is to obey ethical prescriptions under all circumstances. While there must be no unquestioning subjection to existing things, the laws are sustained by examination, and they evince themselves to be the requirements made by insight into what is best for society. Since their basis is reasonableness, they have the right to universal validity. But while Socrates defined the concept, he did not give it a universal content, and diverse conceptions of the ultimate end of human existence crept in to compete. The Stoics conceived of the positive content of morality as harmony with nature, adapted to human nature as the essential nature of man. Life according to nature is a duty which the wise man had to fulfill, a law to which he must subject himself in opposition to his sensuous inclinations. To live according to nature was the sum total of the tenets of Stoic philosophy.

This feeling of responsibility, of oughtness, of recognition of a higher order of things, gives the stoic doctrines their life and validity. These doctrines of the law of life, determined by nature and reason, for all men equally, everywhere, were introduced to Rome through Cicero and became the formative principle of Roman jurisprudence. The ideal form of political life, the Stoic universal state, takes on the outlines of a legal system for the Roman Empire. Cosmopolitanism, as a far off ideal of the Greeks, becomes with the Romans a proud self-conscious, historic mission.<sup>8</sup>

Law in the modern sense begins with the Romans, who built on the philosophical foundation of the Greeks. It was the Romans who first completed the transition from the stage of the primitive law through the stage of the strict law, and from the stage of equity and naturalization to the stage of maturity.<sup>9</sup> When the impact of Greek philosophy was first felt in Roman law, the latter was in the process of transition from the stage of the strict law of a city-state to the stage of equity and naturalization of a law of the world. It was philosophy which enabled the Roman law to make the change, to adapt itself and to grow to meet the new needs of the time and place. Philosophical thinking lent itself to identification of law and morals in juristic thought, as is universally true in periods of growth of the law. Men argued that if something *ought* to be juristically, for that reason alone,

---

8. Cf. WINDEL BAND, A HISTORY OF PHILOSOPHY 80-82, 171-72, 177-78, (Tufts tr., 1926), for discussion of Stoic influence on Greek theories of law.

9. POUND, THE SPIRIT OF THE COMMON LAW 139-45 (1921), discusses the stages of law in the history of a culture.

it is legally; what the law *ought* to be becomes what the law is, positive law (*lex*) being merely declaratory of the higher law (*jus*).

Cicero, a philosopher-jurist and advocate of Stoic ideas, was the first serious student of philosophy of law, and he attempted to state its formula: "There is indeed a true law (*lex*), right reason, agreeing with nature and diffused among all, unchanging, everlasting. . . ."<sup>10</sup> Civil laws were a mere application of this natural law. True law is "a rule of distinction between right and wrong according to nature"; and any other sort of law ought not to be regarded as law or called by that name.<sup>11</sup> Whereas Aristotelian theorists believed in the natural inequality of man, Cicero, following in the wake of stoic idealism, proclaimed man's natural equality; but, whereas for the Greek Stoics this was only an unattainable ideal, for the Rome of Cicero it was an ideal within the reach of man. In arguing for law as right reason, it should be pointed out, however, that Cicero did not maintain that natural law overrode positive law as was asserted in the Middle Ages and later, when higher law ideas had come to be conceived of as being deterministic in nature. Roman jurists never went so far, because the role of reason held sway in less absolute terms. Hence, the most they could do was use their ideas of natural law to shape the content of the actual law as it was developed and applied in the courts. The result was a healthier one than that which later arose out of deterministic natural law ideas.

It was in the writing of the juriconsults that Roman law was influenced by philosophy and began its great period of growth and development. The Romans used laymen for judges, but these magistrates followed the law as given to them by the practicing lawyers, the juriconsults. When conflicting opinions were presented to a judge, he was free to follow the one which he believed to be the law, and he accordingly followed that which seemed to him the most reasonable. Hence, the *responsa* of the juriconsults derived their authority from their reasonableness, the appeal which they made to the sense of right and justice of the magistrate. The *jus naturale*, as a basic concept of universal law, was used extensively in juristic reasoning. When the magistrate chose between conflicting opinions, he selected the one which he believed to be the law by nature. The juriconsults of the classical period (from the Age of Augustus to the third century A.D.) had come to distinguish between that which was right by nature and that which was right by custom and enactment. They said *ius* where Cicero

10. DE LEGIBUS II, 4, 10; HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 9 n.3 (1930).

11. DE LEGIBUS II, 6, 13; Corwin, *The Higher Law Background of American Constitutional Law*, 42 HARV. L. REV. 149, 159 n.33 (1928).

had said *lex*. They sought a valid foundation for their opinions, and, when not bound by the old law, they believed that it was only necessary to expound the reason and justice of a thing in order to lay down the law. The theory of natural law was thus worked out to meet the exigencies of a period of growth and development, as they began their task of making over the old strict law of the City of Rome into a flexible and rational system which would meet the needs of the Empire. The final outcome was the identification of the *jus gentium* with the *jus naturale* as universal law based on reason. Nature became a household word in the life of Rome. The belief prevailed that the old *jus gentium* was the lost code of Nature, and the praetor in framing a jurisprudence on its principles was gradually restoring a type of law from which society had only departed in a period of decay. Roman civil law, recast in the light of this conception, became a universal code, and the *jus naturale* took on the appearance of law with a definite content and guaranteed enforcement.

Dean Pound points out that in antiquity the natural meant "that which expressed most completely the idea of the thing. It was the perfect object," the Platonic Form, the idea of a higher reality in the concept of the object as a class, as contrasted with a specific object of that class. "Hence the natural law was that which expressed perfectly the idea of law and a rule of natural law was one which expressed perfectly the idea of law applied to the subject in question, the one which gave the subject its perfect development. For legal purposes, reality was to be found in this ideal perfect, natural law, and its organ was juristic reason."<sup>12</sup> All man-made rules of law, if they were expressions of more than mere positive law were but imperfect copies of the true law, the real or natural law. Thus, from the Platonic idea of the Form of a thing as the true reality, of which a specific thing was but an imperfect copy, jurists conceived of the idea of a true jural reality of which man-made laws were but poor imitations, to be discovered and developed through reason. This is the doctrine of *ratio legis*, the principle of a perfect natural law behind mere man-made legal rules, the conception of that true law of which positive law was but declaratory, a perfect standard by which rules of law were to be measured and to which they should be made to conform as far as practicable. It was in their effort to measure the positive law by the form of the natural law that jurists employed legal reasoning, since all rules had true jural reality only to the extent that they expressed a principle of natural law.

A political theory as to the purpose or end of law was needed, however, as incentive to the judicial empiricism which was to shape a

---

12. POUND, *op. cit. supra* note 6, at 31-32.



law of the world. It is the jural ideal of the end for which law is conceived which shapes its content in a period of growth and development. The end of law now came to be conceived of by the Romans, as it had been conceived of by the Greeks, as a peaceable ordering of the social *status quo*. When this ideal is applied to the theory of natural law, it follows that an ideal form of the social *status quo* is that which can be furthered and maintained by an existing legal order. Thus, philosophy comes to measure all legal situations by an idealized form of the social order of the time and place, and to shape the law so as to maintain and further this ideal. Thus, an idealized version of the legal system under which a judge or jurist has been trained is conceived of as the ultimate or perfect legal system and its rules and doctrines as the true or natural law. This conception came to permeate and dominate Greco-Roman juristic thought. It has remained in all subsequent legal theory in the West and is the permanent contribution of Rome to legal philosophy.<sup>13</sup>

The importance of Rome's contribution to the subsequent legal history of the West is inestimable. The value of the *jus naturale* lay in its keeping before the mental vision a type of perfect law and in its inspiring hope of an indefinite approximation to such a perfect law. Yet the *jus naturale* never attempted to deny the obligation of existing laws which had not yet been through its sieves. It was never thought of as untested principles, but rather as something underneath and behind existing law, which must be discovered by applying the test of right reason to the existing law. It was thus merely remedial and not revolutionary or anarchical. Thus, it differed radically from the revived natural law of the eighteenth century. It has been suggested by eminent authority that only the theory of natural law as developed by the Greek and Roman jurists has given our Western legal modes of thought that excellence which has enabled it to mould two systems of law superior to the legal systems of the Eastern world.<sup>14</sup>

### III.

#### MEDIEVAL CONCEPTIONS OF LAW

The early church father did not impose any radical changes on legal theory, drawing only upon an additional source "of equally remarkable exegetical possibilities,"<sup>15</sup> the Bible, and identifying the law of God with the principles of the secular law, *jus dei jus naturale*. Everyone was under the law and responsible to God. Temporal institu-

13. *Id.* at 34-36. The writer has drawn extensively on the first three chapters of this delightful little classic for the discussion of both Greek and Roman philosophy of law.

14. MAINE, *ANCIENT LAW* 76-77 (1861).

15. MULLETT, *FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION* 18 (1933).

tions were sacred only so far as they conformed to eternal standards. The civilians, no less than the fathers and the canonists, accepted this authority.<sup>16</sup> Thus, natural law was proclaimed and received, and a philosophical-theological foundation was placed under it.

The movement back to classical antiquity was led by Thomas Aquinas (1227-1274), the greatest of the medieval philosophers. The legal theory then was that positive law was the creature of the sovereign, who was subject to the natural law. Aquinas made over this theory to accord with theology. He divided law into two grand categories, eternal and natural, the former being "the reason of divine wisdom" governing the whole universe, the latter the law of human nature, proceeding ultimately from God but immediately from human reason and governing the actions of men only. Thus, natural law is that part of the divine law which is revealed to man through reason. Human law is but the fulfilling, defining, qualifying and explaining of the divine law. If on any point it is in conflict with the law of nature, it at once ceases to be law and becomes a mere perversion of law. Thus, human law is a mere recognition of the *lex naturalis*, which is above all human authority. Aquinas' work prepared the way for a return, in the seventeenth century, to the classical conception of reasonableness as the source of authority.<sup>17</sup>

Medieval theorists thought of law and the state as having equal status in divine origin. The end of the state was the attainment of justice, and no acts of authority were right which were not in accordance with this principle. Freedom and equality came to be considered as a part of the individual's right and heritage. Property and contract were emphasized as sacred legal rights based on law flowing out of the pure law of nature.<sup>18</sup> Hence, these rights were separate from and binding on the state.

To summarize the difference between the ancient *jus naturale* and medieval natural law, a distinction which is important in the consequences for modern times, the ancients conceived of the *jus naturale* as a goal toward which actual law inevitably tended. It was discoverable by reason when uninfluenced by passion and formed the ultimate source and explanation of the excellences of positive law. The Middle Ages, however, were troubled by personalized, irresponsible rule and a lack of institutional control. Moreover, scripture and church writings conceived of a mystic overlaw, "a brooding omnipresence in the sky." Thus law was conceived of as something to correct a prevalent injustice rather

16. *Id.* at 18.

17. Pound, *Theories of Law*, 22 YALE L.J. 114, 122-23 (1912); MULLETT, *op. cit. supra* note 15, at 20.

18. MULLETT, *op. cit. supra* note 15, at 18; CORWIN, *op. cit. supra* note 11, at 167.

than to account for a prevalent justice. It was a standard from which depraved man was always straying. Its purpose was not to enlighten authority but to circumscribe it.<sup>19</sup>

#### IV.

##### LEGAL IDEALISM AND THE COMMON LAW

On the Continent, the higher law doctrines lacked institutional equipment and final authoritative interpretation necessary to have great practical effect. Both of these deficiencies were overcome in England through the institutional development of the common law. Its real history began in the reign of Henry II with the establishment of a system of circuit courts and a court of appeal. Based on the application of custom and the following of precedent, the judges applied the test of reasonableness, which in time became the chief claim of the common law to be regarded as derived from higher law. Moreover, it was reasonableness and precedent which made it possible for the modern concept of "the rule of law" to take shape. Thus a weapon was forged which was able to meet the challenge of the pretensions of divine right in the seventeenth century. This also resulted in the notion of law as something which stood between the individual and the leviathan, with present day implications.

The contributions of the judicial commentators begins with Bracton, in the reign of Henry II, and ends with Blackstone, five hundred years later. Through his great work, *De Legibus et Consuetudinibus Angliae*, Bracton brought the common law into direct contact with Roman and medieval ideas of higher law. In his most quoted passage, "The King himself ought not to be subject to man, but subject to God and to the law . . .," we see again the medieval idea of authority as derived from and limited by the law. However, he has no idea of the modern conception of "the rule of law." The sole redress against tyranny is divine vengeance, though this might operate through human agency. The problem of institutional control, capable of applying the test of law with precision and regularity, is left undeveloped, just as it was on the Continent.<sup>20</sup>

In the *Magna Carta* we turn from the legal tradition of the higher law to the practical politics of the day. This document, far from having been originally "a muniment of English liberties," as the founding fathers had supposed, was a royal grant of privilege to a limited class of beneficiaries, promising not to infringe on their customary feudal privi-

---

19. *Id.* at 168.

20. CORWIN, *op. cit. supra* note 11, at 171-72.

leges, more or less at the expense of the realm at large. Its importance to us lies in its resurrection by Lord Coke and the Seventeenth Century radicals as the basis of the glorious heritage of the common law and the natural rights of Englishmen.

The glorious epoch of the Charter was from the reign of Edward I to the deposition of Richard II. By then it had become a part of the common law, wherein it resided in obscurity until its revival for use against the Stuarts. Its absorption was due to the fact that it was an age of authority limited by law; that it was in the form of a compact and was drawn in terms which did not confine its application to the immediate issues; and that its successful maintenance depended upon the cooperation of all classes. It was therefore expanded to include the barons within the scope of its protection. Finally, it was confirmed by kings on many occasions, chiefly for political reasons.

It was Parliament which was the particular guardian of the Charter, but in the disturbed times of the War of the Roses, this body practically ceased to exist. The courts, however, continued to function regularly and accomplished the actual realization of most of what the Charter had come to symbolize. As Englishmen began to recognize this, they transferred their worship from the Charter to the common law as a whole. The common law now came to wear a halo and to be pictured as "the highest expression of human reason and of the law of nature implanted by God in the heart of man."<sup>21</sup>

When the Stuarts sought to put themselves beyond the need of Parliament by appeal to the divine right of kings, Parliament challenged in the name of the supremacy of the common law, the outstanding constitutional result of Tudor absolutism. The foremost leader of the opposition was Sir Edward Coke, whom history was to record as a jurist of the first rank. While serving on the bench, he laid down important doctrines concerning the power of the Crown and of Parliament, chief of which was his *dictum* in *Bonham's Case*, that "when an act of parliament is against common right and reason," the common law will "adjudge such act to be void."<sup>22</sup> Tradition has it that he personally repeated to James I the doctrine first pronounced in its historic form by Bracton, that while the King is not under any man, he is under God and the law.<sup>23</sup> After his forced retirement from the King's Bench, Coke sat in the House of Commons and opposed the arbitrary rule of the Stuarts. It was then that he wrote his famous *Institutes*, commentaries

---

21. FIGGIS, DIVINE RIGHT OF KINGS, quoted in CORWIN, *op. cit. supra* note 11, at 179. For a good detailed discussion of *Magna Carta*, see: CORWIN, *op. cit. supra* note 11, at 175.

22. 8 Co. 118a (1610).

23. CORWIN, *op. cit. supra* note 11, at 368-69.

on the common law of England. In this treatise, he completed the work, previously begun in his speeches in the Commons, of restoring the *Magna Carta* as the great muniment of English liberties. He maintained that the *Magna Carta* was the fountainhead of the fundamental laws of the realm, that it was merely declaratory of the common law, that judicial and legislative acts contrary to it were void and that its benefits extended to all freemen. These benefits were the historical procedure of the common law: the processes of the ordinary courts, indictment by grand jury, trial by the law of the land, *habeas corpus*, security against monopoly and taxation by consent of Parliament.<sup>24</sup>

Coke's contributions have been summarized as follows: he furnished the most important single example for future arguments favoring judicial review of legislation, and he lent great prestige to the notion of a fundamental law, having a verifiable content in the customary procedure of everyday institutions which was binding on Parliament and Crown alike. He also contributed the idea of parliamentary supremacy under law, which was transmutable into the idea of legislative supremacy, subject to review by that body which was held by the lawyers as a class to be most expert in the interpretation of the law, namely, the judiciary.<sup>25</sup> His ideas passed into the English Declaration of Rights and Bill of Rights and thence into the American bills of rights of the various states and the federal union.

Out of the struggle of the courts and the Crown the law was liberalized. The chief weapon in the contest was the doctrine of the supremacy of the law, and, as a result of the victory of the courts, it became established as a fundamental part of our legal tradition but with a new scope and spirit. It became a doctrine of limitation upon all sovereign power, independent of positive law and, at most, simply declaratory thereof and individualist in spirit. It became a doctrine that the function of the common law and its courts was to stand between the individual and oppressive state action, to guard individual interests against encroachments of state and society. This doctrine, fortified by natural law theories, led to unfortunate results in our nineteenth century constitutional decisions, as we shall see later.<sup>26</sup>

---

24. *Id.* at 378.

25. *Id.* at 379-80. Cf. CORWIN, *LIBERTY AGAINST GOVERNMENT* 30-2 (1948), showing how the idea became established that judges alone were capable of interpreting the law and thus reducing it to "a professional, a craft mystery." (Emphasis in the original.)

26. POUND, *op. cit. supra* note 9, at 73-74, cf. 76.

## V.

LEGAL IDEALISM IN THE AGE OF THE ENLIGHTENMENT —  
THE NATURAL RIGHTS OF MAN

In the seventeenth and eighteenth centuries, natural law ideas received immense prestige from the work of Newton and Grotius. A new era in jurisprudence began with the appearance of Grotius's great work, *De Jure Belli et Pacis*, in 1625. Grotius took the Ciceronian idea of natural law as "right reason" and made it the basis of all obligation. His great contribution was the freeing of law from theology (God), where it had remained during the Middle Ages. According to Grotius, reason was a law of and unto God. God himself could not make twice two other than four, nor would man's rational nature fail to guide him even if God lacked interest in human affairs.<sup>27</sup>

Newton demonstrated that the physical universe was governed by certain principles which are universal and eternal. He prepared the way for a revival of interest in the physical laws of the universe in some respects reminiscent of the Greeks in their great age of thought. This new natural law, however, reinforced by the medieval teleology and the analogies drawn from the new cosmology, was more deterministic. The physical sciences and the social sciences had not yet been delineated, and men believed that similar principles governed them. What Newton empirically demonstrated in the physical realm, then known as natural philosophy, men believed to be true of the socio-cultural world. Men could discover the principles for their proper self-government by law through reason. Reason was the key which would unlock the social universe as it was unlocking the door to knowledge of the physical world. With great enthusiasm men entered upon their task. Within the foreseeable future they perceived the advent of a millenium on earth, created by the efforts of man, with God the Watchmaker only looking on in the background. It was no accident that the next century would establish vast new mental horizons and would be known as the Age of Reason and Enlightenment.<sup>28</sup>

There were two parts to Grotian natural law theory: (1) limitations on human activities, imposed by reason in view of human nature and (2) natural rights, moral qualities inherent in persons, demonstrable by reason, as deductions from human nature, which ought to be given the effect of positive law.<sup>29</sup> The end or purpose for which law

---

27. Pound, *The End of Law as Developed in Juristic Thought*, 27 HARV. L. REV. 605, 611-13, 616-17 (1914).

28. CORWIN, *op. cit. supra* note 11, at 381 ff., contains a good discussion of Grotius and Newton.

29. POUND, *op. cit. supra* note 27, at 617-18; POUND, *op. cit. supra* note 9, at 87 ff.

existed was to produce conformity to the nature of rational creatures, that is, to give effect to these natural rights. Again, law is in the stage of equity and naturalization, when it is necessary that the strict law of the later middle ages should be made over to meet the needs of the modern age of discovery and exploration and the commercial requirements of the modern world. The tendency is again to hold that the moral and the legal are necessarily synonymous, that if a thing ought to be juristically, for that reason, it is legally. "Hence the scheme of natural rights that the law ought to secure, quickly becomes the scheme of fundamental rights which it does secure, legal rights being merely declaratory thereof."<sup>30</sup>

The insistence of what ought to be as the measure of what is did great things for the remaking of the law along liberal and modern lines by the testing of every doctrine on the basis of reason. But the idea of natural rights as the jural order of nature led to absolute notions of such rights and later brought legal thought into conflict with popular political thought. Natural rights mean simply interests which we think ought to be secured by law. While not created by the state or by law, the devices by which they are secured are the work of the state. But to treat them as legal conceptions is fatal to sound thinking, and resulted in the exaltation of the individual interest, the confusion of the interests desired to be secured with legal rights, and made the natural rights of men as tyrannous as the divine right of kings.<sup>31</sup>

It soon became apparent that the theory of natural rights as inherent moral qualities would not serve as a basis for the natural rights of property. Yet it was assumed as beyond question that a natural right of property existed, since none of the jurists questioned the existing social order. They assumed that the security of acquisitions was a chief end of law, but they could see a difference between the natural rights of property and personal natural rights, such as freedom of speech and thought. Hence, for an explanation and defense of property rights, they turned to contract.<sup>32</sup>

The Roman idea of contract as a legally permissible willed result, combined with natural law theories of natural rights, was based on the nature of men as reasoning creatures possessed of wills. Moreover, there was a pressing need to rework the old ideas of contract in light of the new philosophical materials and beliefs. Men therefore reasoned that the foundation of natural rights which the law existed to maintain was a legal transaction, a compact of all men with all men, by virtue of which corresponding rights and duties were created. The end of law

---

30. *Id.* at 91.

31. *Id.* at 91-93.

32. *Id.* at 93.

was to give effect to the inherent moral qualities of individual men and to secure for them those things to which they were entitled under the terms of the social compact.<sup>33</sup>

The eighteenth century system of natural rights was a closed, hard and fast system, because the jurists were certain that they could deduce all of the inherent moral qualities of man and all of the terms of the social compact from the nature of man in the abstract. Natural law, discoverable by deductive reason as a necessary result of human nature, was no less absolute. It was believed possible to discover, and that the jurists had discovered, principles of universal validity for all men throughout all time, from which could be deduced a complete code for the lawgiver, a complete constitution for the statesman and an infallible guide to the conscience of the individual. Hence, from this period come the elaborate codes, constitutions, bills of rights and political and legal charts prescribing principles for the guidance of men for all time.<sup>34</sup>

In the conveyance of natural law ideas to America, John Locke stands out. He conceived of man in a state of nature, controlled by principles of natural law. But since violations of man's natural rights did occur in such state, men bound themselves together by means of a Social Compact which instituted civil governments, conformable to the laws of nature. Such governments could not exceed the powers conferred upon them by the compact which brought them into existence; hence, revolution was justified where tyranny developed. With this exception, the legislative power was supreme. Locke's labor theory of value justified the inequalities of possessions, harmonizing this with the social compact. This later became the cornerstone of Adam Smith's doctrine of *laissez-faire*.<sup>35</sup>

Two theories of natural law stand out in the eighteenth century: (1) law as right reason, above state and society, permanent and absolute realities, which the state exists to protect; and (2) rights as the product of the human will, an outgrowth of the social contract. But law emanates from the sovereign, and the idea of command or the general will is paramount.<sup>36</sup> In any event, rights are natural, inherent,

---

33. *Id.* at 94.

34. *Id.* at 95-97, 145-46. It was an age of "paper-constitution making" and disregard of the conditions of the time and place; of belief in the power of reason to work miracles in legislation (a code-making era); of belief that by mere reason, judges might administer such codes in purely mechanical fashion and yet achieve a perfect result. Hence, men were scornful of history and traditional legal materials. Unaided reason alone was recognized. POUND, *INTERPRETATIONS OF LEGAL HISTORY* 12 (1930).

35. LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT*, Chs. 4, 5, 6, 11 and 19; discussed in MULLETT, *op. cit. supra* note 15, at 58; and CORWIN, *op. cit. supra* note 11, at 389-91.

36. POUND, *op. cit. supra* note 9, at 150-51. In the nineteenth century, the second theory passed into political thinking and the science of legislation. Following Bentham, it was taken up by the analytical jurists who were dominant in England during the first half of the century, but it was never congenial in America. The first theory



eternal and universal, and they are demonstrable by reason. Natural law is a body of rules, ascertainable by reason and perfected to secure these rights. The state is an instrument to secure these rights, which it does through positive law conforming to natural law. This is the key to an understanding of our constitutional law. Since the appeal is to individual reason, every individual is the judge of whether the positive law conforms to the natural law. To avoid anarchy as a logical conclusion, a sort of standard conscience is assumed. Thus arises the conception of an abstract ideal individual, in an abstract ideal universe, governed by abstract ideal principles of universal and eternal validity. In fact, the ethical view of the particular jurist became the test of the validity of a rule, and an idealized version of the system in which he had been trained became the content of the natural law.<sup>37</sup>

The theory of natural rights fitted so perfectly with the common law rights of Englishmen that the founders of our republic who were studying Coke and Blackstone on the one hand and the French and Dutch publicists on the other believed that they were reading about one and the same thing. Hence, Americans at the end of the eighteenth century argued for either or both. Thus the common law rights of Englishmen became the natural rights of men.<sup>38</sup> Moreover, the identification of the common law rights of Englishmen with the natural rights of man and the fundamental law for which Coke contended with natural law gave currency to an idea of the finality of the common law, with all that the concept of finality is capable of implying. A second effect of eighteenth century theory upon common law tradition was to intensify the individualism which already existed in generous supply, from which it followed that the common law was taken as a closed system of giving effect to individual rights — as against arbitrary invasion by state and society. It followed naturally that constitutions and bills of rights were merely declaratory of the common law. This idea was the *leitmotif* in judicial decisions of the classical period of American common law and constitutional law; it figured prominently in the decisions on liberty of contract and the rights of property under the substantive due process concept, and its remnants remain in our judicial decisions at the present time. Constitutions and bills of rights were interpreted in light of this tradition, and statutes were deprived of their intended effect or declared unconstitutional if they deprived men of a theoretical jural equality or placed limitations on their absolute right to contract.<sup>39</sup>

---

passed into metaphysical and historical jurisprudence. Already accepted by the American lawyer, it came back to him in scientific garb from Germany and became a settled conviction. *Id.* at 150-51.

37. POUND, *op. cit. supra* note 27, at 622-24.

38. *Id.* at 624-25.

39. POUND, *op. cit. supra* note 9, at 95-96, 100-02, 106-08.

With the coming of a period of collectivistic thinking and social and economic legislation, conflict of ideas and ideals was inevitable. Such a conflict did result when the absolute theory of law came into conflict with the absolute theory of politics. The popular theory of sovereignty is that the will of the people, acting through their elected representatives, is supreme, and the duly enacted laws are but a formulation of the general will; that law can be made, and that they have the power to make it; that they are the authors of all constitutions and codes and the final judges as to the meaning and effect of such instruments. But to the lawyer trained in classical natural law theory, principles of law are absolute, eternal and of universal validity; law is found, not made; it is above and beyond all will. An idealized version of the common law thus becomes the natural law. Hence, it often happened that when "the people" thought they were making laws, the courts believed that "the people" were abrogating the law through mere will unrestrained by reason; whereas, when the courts thought they were upholding the law, "the people" believed that the courts were refusing to follow the laws duly enacted by the sovereign rulers of the state.<sup>40</sup>

The Byzantine conception of the sovereign as one in whom all lawmaking and all coercive powers of politically organized society are concentrated (the will of the sovereign has the force of law) was handed down to the modern world in the law books of Justinian. It succeeded in France and throughout western Europe and superseded the Germanic and feudal conception of a relation of protection and service growing out of land tenure and involving reciprocal rights and duties. When this idea came to prevail, the sovereign was a Byzantine emperor. What the emperor willed had the force of law. Law was thus the will of the state, the command of the sovereign. Whatever his moral duties, the emperor was incapable of limitation. He was possibly under God, but not under the law, for he made the law. This conception of the law as will has been struggling with the idea of the law as reason ever since.<sup>41</sup>

When our constitutional law came into conflict with this new conception of sovereignty (developed in France along Byzantine lines) it was forced to a position which — while admitting a political theory of illimitable and uncontrollable power in the sovereign itself — sought to impose, through constitutions and bills of rights, legal limits upon the action of those who wielded the powers of sovereignty. Yet the theory behind the constitutions and bills of rights was the legal duty of the sovereign to his subjects; that there was a law above and behind all sovereigns which they could not alter and by which their actions might

---

40. *Id.* at 98-99.

41. *Id.* at 76-78.

be judged; and that the law stood between the individual and this leviathan, compelling it to recognize the natural rights of the individual and the terms of the social compact whereby the individual had conferred upon the leviathan this very sovereignty, and that the latter had undertaken to secure the individual in his natural rights.<sup>42</sup> It was inevitable that the conflict between two inconsistent theories should sooner or later produce a conflict between the courts and the people, a conflict between juristic theory and political theory as to the nature and source of law and from what it derives its binding force. Each theory was the outgrowth of seventeenth and eighteenth century thought.

## VI.

### THE NINETEENTH CENTURY IDEALISTIC SCHOOLS

As the old natural law was reaching the height of its influence in America, it was being dealt its death blow by Kant, who undermined its seventeenth and eighteenth century foundations. Kant and his followers conceived of the first problem of law as its relation to liberty. Throughout the eighteenth and nineteenth centuries, men were concerned with reconciling the idea of liberty with government, the ideal of individual freedom of self-assertion with the obviously necessary coercion by judicially enforced legal precepts demanded for the general security. Kant met it by the formulation of his theory of legal justice, by working out the idea of an equal chance for all, exactly as they are, with no artificial or extrinsic handicaps. Whereas the eighteenth century conceived of a body of principles of right by deduction from the ideal of the abstract man as a moral creature, Kant found a single ultimate principle of right by deduction from a rational harmonizing of free wills.<sup>43</sup> He postulated the conscious free-willing individual man as an ultimate metaphysical value. Thence, by deduction, he conceived the problem of the legal order as one of the prevention of conscious, free-willing individuals from interfering with one another, that is, of reconciling conflicting free wills, independently exercised, by universal rules whereby the will of each may co-exist with the will of all others.

---

42. *Id.* at 80-81. Dean Pound believes that both theories must be substantially modified, that sovereignty conceived of as "public service from within" is satisfactory and that a doctrine of supremacy of the law, shorn of its seventeenth and eighteenth century natural law extravagancies, is entirely in accord with such a conception. The common law must abandon the defense of the abstract interest of the abstract individual and stand for the "ultimate and more important social interests" as against the dictates of popular political action of the moment, when law frequently becomes "mere will unrestrained by reason." *Id.* at 81.

43. Kant defined law (*Recht*) as "The sum of the circumstances according to which the will of one may be reconciled with the will of another according to a common rule of freedom." KANT, *PHILOSOPHY OF LAW* (1797), as quoted in POUND, *OUTLINE OF JURISPRUDENCE* 65 (5th ed. 1943).

This put a new philosophical foundation under the idea of justice as the maximum of free individual self-assertion. This third ideal of the end of law, which came in with the Reformation, took shape in the seventeenth century and reached its final logical development in the metaphysical and historical jurisprudence of the nineteenth century.<sup>44</sup> It fit in with the democratic ideals of the French Revolution and the doctrines of the classical economists, who demanded the widest possible freedom of action for the individual conscience. Its rationalization of the needs and desires of an era of discovery, colonization and commerce, and later, of an era of expansion and industrialization, are obvious.<sup>45</sup>

The metaphysical jurists sought to deduce from some single fundamental idea a complete system of principles of universal validity to which jurists should endeavor to make actual law conform. They accepted the Kantian ideal of the end of law as the harmonizing of conflicting free-wills and developed this idea into its logical consequence of liberty, of general freedom of action for the individual. They conceived of law as the logical development of an abstract idea, the unfolding of a principle involved in the abstract conception. They believed that law was to be found, not made, and they proceeded to find it in a principle of right and justice as expressed in a rule. Right was a condition in which the will of the individual was reconciled with the will of each and every other individual, according to a universal principle. This principle was liberty. The test of right and justice with respect to any institution, doctrine or rule of law was the amount of abstract individual liberty which it assured. The metaphysicians were the nineteenth century law of nature school. This school never gained many converts in England or America, but, through its influence on the historical school and its re-enforcement of the idea of eighteenth century individualism, it exerted a considerable indirect influence on Anglo-American juristic thought.<sup>46</sup>

During the nineteenth century, however, another school of juristic thought arose, which was destined to play a direct leading part in the shaping of Anglo-American legal decisions and to extend its influence well into the twentieth century. This was the historical school. Its leading advocate was the German jurist, Frederick Von Savigny, and the core of its belief might be expressed as follows: All development of law is dependent upon historical limitations, and positive law may be made clear only by recourse to its derivation from history.

44. "Beginning as a political theory of securing men in a natural (*i.e.* ideal) equality, it became a juristic theory of securing them in their natural rights . . . and by a further simplification became a theory of securing them in an abstract freedom of will." POUND, *LAW AND MORALS* 97 (1926).

45. *Id.* at 11, 28 ff., 32, 97, 119 ff.; POUND, *op. cit. supra* note 9, at 147 ff.

46. *Id.* at 152-55.

The historical school was a reaction to the eighteenth century law of nature, with its emphasis on reason and its disregard of history and traditional legal materials. It was one facet of the revolution in German thought at the beginning of the nineteenth century, and its leading exponents were to be found in Germany. It rejected the conception of a super-natural rule of right. It was a reaction against natural law, its rationalism, universalism and individualism. For these tenets, it substituted the *Volksgeist*, a historical development which immersed the individual in the collective life. Law was conceived of as the *Volksrecht*, the product of the nation and its national genius.

The historical school was a part of the romantic movement which embraced the fields of literature, Hegelian philosophy and law. The conception of the folk-soul inspired not only the philosopher and *litterateur*, it inspired the historian as well. Hegel and the Hegelians took the Folk and lifted it into the heavens of metaphysics. The Folk became a Mind but not only a Mind — the incarnation of the Eternal Mind. They are therefore divine, they are right and final within their time and place and cover every range of life. Organized in the State as the highest power of its life, the Folk attains the highest synthesis of its faculties.

Savigny combined Kant's theory of right with the Hegelian dialectic to create a new theory of law, based on concepts derived from studies of legal history and sometimes referred to as natural law with a historic content. Like the metaphysical school, the historical school sought to deduce a complete system of principles of universal validity from some single fundamental idea; instead of liberty, however, they found this idea in history. A historically derived conception was believed to be the whole measure of judicial action. Hence, the thought of this school has been called the "jurisprudence of conceptions." Law was regarded as the product of the civilization and culture of a people. An understanding of law and the legal system could be had only by studying its historic development from the stage of the primitive law to the present time. Law was the progressive unfolding of an idea which could be traced back in history — the historical unfolding of the idea of liberty as men discovered through successive ages the rules by which to realize it. Hence, law could not be consciously made, it could only evolve. Law was a principle of human or social action found in human experience, gradually developed and expressed in a rule. Law was an ideal form of historically found principles constraining development for all time within historically fixed bounds. It was a system of precepts discovered by human experience, whereby the individual will realize the most complete freedom possible, consistent with a like free-

dom of all other individuals, but it insisted that the reconciling of free wills must be undertaken through the development of the historic content of the law. History shows us the idea of individual liberty realizing itself in legal institutions, rules and doctrines. The development of law is a gradual unfolding of Kant's idea of right in human experience of the administration of justice. The law itself is a body of rules which determine the bounds within which the activities of each individual are secured a free opportunity.

The German historical school was launched on its way by the publication of Savigny's famous little book in 1814. In perhaps its most famous passage, Savigny wrote of the inevitability of the historical unfolding (determinism) of the law:

In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin.<sup>47</sup>

Elsewhere, he compared the development of the legal system of a people to their linguistic development:

For law as for language there is no movement of cessation. It is subject to the same movement and development as every other expression of the life of the people. . . . All law was originally formed by custom and popular feeling, next by jurisprudence — that is by silently operating forces.<sup>48</sup>

It has been said that Savigny gave to history the place which medieval juristics gave to theology; the seventeenth century, reason; and the eighteenth century, the nature of man.<sup>49</sup>

This historical determinism meant that the lawgiver's only function was to write down what the spirit of the people dictated. To this end he had to be adequately instructed in systematic studies as to the true meaning of the folk-spirit. From this, three results followed, which summarize the tenets of the school and indicate the way in which its influence was exerted: (1) Customary law was preferable to legislation; (2) chief attention of the legal scholar must be directed toward

47. SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 24 (Hayward tr., 1831).

48. Quoted by E. BARKER, in "Introduction to Gierke," NATURAL LAW AND THE THEORY OF SOCIETY liv. (1934).

49. POUND, *op. cit. supra* note 9, at 153.

following out the historical course of development of the law and (3) objective criticism of actual law as given by history was in the strict sense of the word considered impossible, for law was not the product of the will but of common conviction, and the rejection of the product of history was considered equally impossible.<sup>50</sup>

The historical school considered that the particular case must be fitted to the historical conception, rather than the conception fitted to the particular case so as to bring about a result by which the law might be given effect with reference to its purpose. The result of the particular case was held to be immaterial because historically inevitable. In Continental Europe, the civilians maintained that the legal conceptions to be found in the writing of the Roman jurists of the classical period sufficed for the solution of all modern legal problems. Likewise Anglo-American jurists held that universally valid conceptions for our times and circumstances were present in the classical common law of the sixteenth and seventeenth centuries, if not in the Year Books themselves. These jurists doubted the efficacy of legislation on the grounds that it sought to make that which cannot be consciously made. They held that the vital organs of law were doctrinal writing and judicial decisions, whereby the life of a people expressed in its traditional rules of law made itself felt in the gradual development of those rules to meet modern conditions.

From this it followed that case law is the normal type of law-making and legislation the exception, to be resorted to only on special occasions and for special reasons. It must be presumed that the legislature intended no innovation upon the common law, all departure therefrom must be strictly construed and the operation of statutory changes must be restricted to those particulars in which the intended changes are clear and express. Legislative law-making is a subordinate function and exists only to supplement the traditional element and to set juristic tradition on the right path when it has gone astray in respect to some minor detail, which might come about only by a misunderstanding, by a particular court, of the applicable historical content of the law.

If the law was in the form of a code, the code was assumed to be mainly declaratory of law as it had previously existed. The code was regarded as a continuation and development of the pre-existing law. All expositions of the code must begin with an elaborate inquiry into the pre-existing law and the competing decisions and rules from among

---

50. Cf. Stammer, *Fundamental Tendencies in Modern Jurisprudence*, 21 MICH. L. REV. 623, 647-51 (1923); also, POUND, *op. cit. supra* note 34, at 12-20. Dean Pound comments that in Hegelian philosophy, the historical school made a new foundation for an old way of thinking.

which the framers of the code had to choose. If the law was in the form of reported decisions, the later ones were regarded as but declaratory and illustrative of the principles to be found in a historical study of the older ones. All exposition must begin with an elaborate historical inquiry in which the idea that has been unfolding in judicial decision is revealed and the lines along which legal development must move are indicated.

A political interpretation of the historical school was attempted by the Englishman, Sir Henry Maine. Maine saw freedom as a political idea realizing itself in history, in the movement of progressive societies from status to contract, "in which men's duties and liabilities came more and more to flow from willed action instead of from the accident of social position recognized by law."<sup>51</sup>

American constitutional law felt the full effect of the jurisprudence of conceptions in the post-Civil War period. The idea of liberty of contract, so congenial to the American individualist, was conceived to be a natural and inherent right and essential to the maintenance of "due process of law." The doctrine of the "police powers" of the state, conceived as the only permissible restrictions on free individual self-assertion for the public health, safety or morals, and the idea of a business with a public purpose conceived of as limited to the utilities industries, as the only ones which governments should be permitted to regulate, are examples of the effect of this school's influence. For a time, historically derived conceptions seriously competed with the standard of reasonableness as the criterion for testing the constitutionality of social and economic measures for the benefit of the general public, usually to the detriment of the latter.<sup>52</sup>

For our purposes five types of philosophy of law in the nineteenth century are significant: the metaphysical school and the historical school, heretofore discussed; the utilitarians, the positivists and the mechanical sociologists. Starting from diverse points and pursuing wholly independent routes, all five reached the same conclusions, to wit: (1) the futility of conscious effort to improve the conditions of humanity through law and (2) the end of law as the securing of the maximum of free individual self-assertion. While the historical school is the only one whose influence was greatly felt in the United States,

---

51. POUND, *op. cit. supra* note 6, at 266. Maine's dictum that "the movement of progressive societies has hitherto been a movement from Status to Contract" is classical; but while true for the studies which he had made, it appears that the movement is in the opposite direction today. See POUND, *op. cit. supra* note 9, at 185 ff., 193-216, 28-31. Discussion of the historical school is found in the various writings of Dean Pound, in addition to the sources heretofore cited. See particularly: POUND, *op. cit. supra* note 9, at 151 ff.; and POUND, *op. cit. supra* note 6, at 48-49, 52, 65, 84, 106, 125, 266.

52. POUND, *op. cit. supra* note 44, at 123.



the others deserve brief mention because of their effect in strengthening the views of the historical school.

Jeremy Bentham, the founder of utilitarianism, did not question individualism. In his life work of law reform, he took as the principle of utility the one test: Does the rule or measure promote human happiness? His aim was to promote the greatest good to the greatest number, and he assumed that the greatest general happiness could be procured through the greatest individual self-assertion. The mechanical sociologists sought to discover "absolute mechanical social laws whose inevitable operation produced all social, political and jural institutions, as completely apart from human will as the motions of the planets."<sup>53</sup> The positivists sought by observation and experience to find laws of morals and of legal and social evolution analogous to natural physical laws. Herbert Spencer was the leader of this school, and his writings achieved great influence in the United States and held place longer because of the special influence of the positivists on the historical school.<sup>54</sup> The influence of these schools, however, was not felt in America until the nineteenth century was well under way.

## VII.

### FUNDAMENTAL RIGHTS IN THE SUPREME COURT TO 1860

In the early days of our struggle for independence, our statesmen accepted principles of natural law to justify change. Such, for example, was the natural law of Thomas Jefferson and the radical leaders who advocated the right of revolution and the political sovereignty of the people. This was the radical side of natural law, with a tradition dating from the seventeenth century attack on authority. Its classical exposition of the Revolutionary Period is contained in the *Declaration of Independence*. But there was also a conservative, unifying side to natural law, a side making for stability, system and organization. This side rationalized and protected property rights, opposed personal justice and arbitrary administration. This side of natural law has a longer history, extending even to the Greek city-state. This was the side of natural law which was wielded as a weapon for vested rights by Marshall, Kent and Story and the other great judges of the formative era of American law, when the foundations for a great national legal system were being laid in the first half of the nineteenth century. This conservative natural law rendered great service during this formative era. This side of natural law, however, in the hands of conservative

---

53. POUND, *op. cit. supra* note 9, at 161.

54. *Id.* at 151-65, where Dean Pound discusses the five schools. The last three are discussed at 159-62.

and reactionary judges, was out of touch with the time. It could be, and has been, used as a formidable weapon to oppose statutory regulation and particularly socio-economic legislation in what has been called the period of the socialization of our law.<sup>55</sup>

The classical statement of our Supreme Court on natural law is an *obiter dictum* of Justice Chase, in *Calder v. Bull*,<sup>56</sup> in which he stated:

An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded.<sup>57</sup>

Five years later, by what has been termed a *tour de force*, Chief Justice Marshall laid down the doctrine of judicial review, at the same time taking occasion to observe that our government "has been emphatically termed a government of laws, and not of men."<sup>58</sup> However, Marshall was not without some authority for his position. The experience of the judicial review of colonial legislation with respect to its conformity to charters granted by the King, the analogy of our written constitutions fortified by bills of rights and the general principles of natural law theory, and the natural rights behind all written constitutions all support his position. In 1810, Marshall declared that the State of Georgia could not revoke a grant of land for fraud where title has passed to bona fide purchasers. The act of the legislature was declared invalid "either by the general principles which are common to our free institutions or by the particular provisions of the [C]onstitution. . . ."<sup>59</sup> This decision is a clear illustration of the principle of jurisprudence that an idealized version of the legal system under which the particular jurist has been trained is taken as being the natural law. Marshall so understood it, because the common law would not allow private parties in court litigation to have achieved the result which the "sovereign" state of Georgia unsuccessfully attempted to achieve by legislation under its theory of popular sovereignty.

It is generally recognized today, however, that the result reached by Marshall was by no means inevitable or even necessary. The doctrine of vested rights was further strengthened and extended by the Court in

55. Cf. POUND, *op. cit. supra* note 9, at 28-31, 185 ff., 193-216.

56. 3 Dallas (3 U.S.) 386 (1798).

57. *Id.* at 387-88. The Court there declined to hold that a legislative act which set aside a judicial decree and granted a new trial was an *ex post facto* law and therefore void.

58. *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 163 (1803).

59. *Fletcher v. Peck*, 6 Cranch (10 U.S.) 87, 139 (1810).

*Trustees of Dartmouth College v. Woodward*.<sup>60</sup> Here, Marshall held that a state could not cancel the charter of a private college originally obtained under a grant from the King. He expanded the conception of contract as used in the Constitution to cover any obligation under which a party could claim a benefit and held the contract clause applicable to corporations. Again, in this decision, the idea of a higher law of which the written law is but declaratory had great influence, and the ethical notions of the particular judge determined the content of that law regardless of how the actual written constitution may have read.

There were numerous other decisions of the high court having similar significance for our purposes, but these are illustrative, and they serve to show how a background of judicial theory extending back into the Middle Ages has continued to shape and influence the growth of the law.

In 1856, there came the most important decision between *Marbury v. Madison* and the Civil War, the celebrated *Dred Scott* case.<sup>61</sup> Drawing on the social compact and natural law ideals, Chief Justice Taney there invoked the "due process" clause of the fifth amendment as a limitation on the power of Congress to legislate where doing so would interfere with a right of property in the classical common law sense. Treated in only three prior decisions of the Supreme Court, the "due process" concept was probably considered procedural, but in this instance the Court infused its ethical notions of substantive vested rights of property into the phrase "no person shall be deprived of property without due process of law" to hold that this meant that the full use and enjoyment of the property could not be modified by legislative action, even to the extent of prohibiting slavery north of the parallel of 36° 30' (except in Missouri), for the benefit of the general public. Thus was a precedent established for the introduction of natural law content into the written constitution, as a re-enforcement against the claims of popular sovereignty and social legislation which were to arise in the post-Civil War period.

## VIII.

### STATE COURT ORIGINS OF DUE PROCESS

During this same period, which has been denominated the classical period of the American common law, the state courts, under the leadership of Chancellor Kent of New York, were writing vested rights

60. 4 Wheat (17 U.S.) 518 (1819). Compare, *Stone v. Mississippi*, 101 U.S. 814 (1880), which upheld a state constitutional provision prohibiting lottery contracts, thus invalidating existing lottery contracts, on the theory that a state cannot bargain away its public health or morals. This case is sometimes said to have overruled the *Dartmouth College* Case.

61. *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856).

doctrine into the constitutional law of the states as a higher law. The idea of fundamental rights, behind all constitutions, of which written documents are but declaratory, had thoroughly permeated the juristic thought of the times and appears explicit in these vested rights decisions. Man in a state of nature had natural rights which he surrendered when he accepted organized government, but only to the extent that he would benefit therefrom; to wit, in the protection of his life, liberty and property. This was the principle on which the social compact was based; hence, the powers of government were inherently limited.<sup>62</sup>

However, this was also the age of Jeffersonian and Jacksonian democracy, and before the onslaught of "popular sovereignty" the conservatives had to take shelter. It was soon realized that if protection of property rights was to remain in the hands of the courts, some constitutional provision must be found which would lend its support to the work which natural law theory was unable to do alone. The judges must be able to say that they were only interpreting the constitution itself when they struck down legislative enactments which infringed on the rights of property.

The accepted theory was that all power emanated from the people. The people elected the legislatures, but they also adopted the constitutions as documents to guide these law-making bodies. The constitutions were actually "social compacts" which the people made with each other when they surrendered their natural liberty for the protection of organized government. Hence, what limitation upon legislative bodies could be more reasonable than one which was found in the written constitutions, placed there by the people themselves? Then, the ultimate protection that could be given to the doctrine of vested rights would be to find some clause in the constitutions themselves that could be interpreted as forbidding legislation from infringing on vested rights. The importance of this step has been proven by the part which due process has since played in our constitutional law. Greater significance has been attributed to it than to written constitutions with specific limitations on legislative power, coupled with the practice of judicial review.<sup>63</sup> It radically enlarged the scope of our constitutional law and substantially altered the form of our government.

It was the "law of the land" clause of the *Magna Carta*, incorporated in some of the older state constitutions and in the fifth amendment of the federal constitution, which was seized upon. Originally, these were procedural concepts which meant that one could not be

---

62. Dean Pound discusses all phases of our early legal development, in historic setting, in *THE FORMATIVE ERA OF AMERICAN LAW* (1938), *passim*.

63. HAINES, *op. cit. supra* note 10, at 101-02.

deprived of his rights arbitrarily, that is, without recourse to law. By this time, however, they had come to mean that a fair trial according to the customary modes of procedures was required.

Then, in a series of cases beginning with *University of North Carolina v. Foy*,<sup>64</sup> in 1804, the "law of the land" and "due process of law" clauses were held to limit the control of legislatures over the rights of property. But it was after 1830, when the doctrine of vested rights per se was on the wane, that the "due process" clause took real hold in state constitutional law. In this accomplishment, the great jurisdiction of New York was destined to be the leader.

Chancellor Kent had done great work for vested rights in his decisions on the bench, and when he retired in 1823 he had already written his famous *Commentaries*. In this treatise, he carefully limited the powers of government over property rights to taxation, eminent domain and reasonable regulation. Eminent domain could be used for public purposes only, with full compensation for property taken or damages. Regulation was permissible only to the extent of the prevention of nuisances, in the interest of health, safety or morals.<sup>65</sup> These limitations were to influence the thinking of several generations of lawyers and thus to play an important role in the substantive meaning given to "due process of law."

The incorporation of the doctrine of vested rights into the "due process of law" clause of the New York Constitution was begun in a line of cases starting with *Taylor v. Porter*,<sup>66</sup> in 1843. In this case, a statute endowing individuals with the right to condemn their neighbors' land for private highways was held to violate both the "law of the land" clause of the state constitution and the more recently added "due process of law" clause. Relying upon precedent from North Carolina, the Court reasoned: that title to property could be tried only in the courts; that forfeiture of property could only be made by judicial declaration after a judicial trial; that the power of eminent domain could be exercised only for a public purpose and that it was logical that the courts should be the body to determine whether a given purpose was public, as a part of their task of determining whether due process of law had been observed.

The decision of the same court in *Wynehamer v. State*<sup>67</sup> was perhaps the most important state court decision of this period. The

64. 2 Hayw. (N.C., 1804) 310.

65. 2 *Comm.* \*332, \*340, \*338 ff.; CORWIN, *LIBERTY AGAINST GOVERNMENT* 79-80 (1948).

66. 4 Hill (N.Y.) 140 (1843).

67. 13 N.Y. 378 (1856). Professor Corwin traces these pre-Civil War due process decisions in the state courts with great thoroughness in *LIBERTY AGAINST GOVERNMENT*, *op. cit. supra* note 64, at Ch. III, *passim*.

court there declared unconstitutional a New York statute prohibiting the sale of intoxicating liquors, because in its retrospective operation the statute took away the right to sell liquors which were owned at the time of its enactment, thus destroying a right of property. The Court recognized that, under the police powers, the state could forbid the manufacture and sale of liquors after the time of its enactment but held that it could not destroy property rights already in existence. Moreover, the right not to be deprived of property without "due process of law" included the right to sell such property. The separate opinion of Judge Comstock recognized that high authority supported the proposition that legislative bodies are limited by "fundamental principles," "common reason" and "natural rights," but refused to consider this argument since it was easier to demonstrate that the act was void as being in direct conflict with the constitution itself.

## IX.

### DUE PROCESS FROM THE CIVIL WAR TO THE NEW DEAL

Though the United States Supreme Court had indicated its approval of the due process concept prior to 1857, in that year it gave its guinea stamp to the substantive natural law concept of due process in the celebrated *Dred Scott* case, already discussed. Nevertheless, its decision was so unpopular with the general public that the doctrine received no great attention thereafter from that body for another generation. Beginning in the 1870's, however, under the judgment of a different Court, which nevertheless continued to have at heart the protection of the rights of property, the due process clause took on new life. This time, however, it was to have a wider field of application, because the phrase appears in the fourteenth amendment, which limits the power of the states. It has since had a long and vital history, which can be understood only in the light of natural law doctrines.

The year 1868 saw the addition of the fourteenth amendment to the Constitution and the publication by Judge Cooley of his treatise on *Constitutional Limitations*, said to have been the most influential book ever published of the subject of constitutional law. It provided a systematic statement of the results of the pre-Civil War decisions protecting vested rights by the "due process" and "law of the land" clauses of the state constitutions. Judge Cooley frankly espoused the notion of limited governmental powers where vested rights of property were involved. This, however, was subject to the exception of reasonable regulation in the interest of health, safety or morals of the public,

which was already ripening into the present-day concept of the police power. It was the courts, he maintained, which should decide when legislation which interfered with vested rights might be permitted as a proper exercise of the police power and when it might not. He cited ample precedents both upholding and striking down legislation by applying these principles.<sup>68</sup> Thus, at the time when the due process clause was incorporated into the United States Constitution as a part of the federal law binding on the states, the way was pointed out for receiving the vested rights-due process of the pre-Civil War era and for making it binding on the states through uniform federal decisions imposed from above and beyond the states as individual entities. The Court, however, took some time to evolve this doctrine.

When the fourteenth amendment was ratified, many people feared that the result was to abolish our dual form of government, by converting the "privileges and immunities" of state citizenship into "privileges and immunities" of national citizenship.<sup>69</sup> A majority of the Supreme Court felt, however, that the implications of the fourteenth amendment had escaped the popular attention, that the formal assent of a good third of the country had been essentially coerced, and that the duty of the Court lay in assimilating the amendment to the constitutional system as a whole as it had come down from the past, particularly with reference to the principles of dual federalism. Therefore, when the first case came up under the new amendment, the Court denied the relief prayed for by making a narrow interpretation of the privileges and immunities clause, saying that the amendment was limited to the protection of the Negro in his newly acquired status as a citizen. This was the broad result of the celebrated *Slaughter-House Cases*.<sup>70</sup> An act of the state of Louisiana had created a corporation and vested it with a monopoly over the slaughter of animals in New Orleans. It was challenged on the ground that it violated the privileges and immunities of national citizenship under the fourteenth amendment, namely, the right to pursue the common calling of a butcher. The Court, however, construed this clause so as to leave little room for innovation in the original dual system. The argument that the privileges and immunities of state citizenship had now been converted into privileges and immuni-

---

68. Discussed in CORWIN, *op. cit. supra* note 67, at 116 ff.

69. The first and last sections of the fourteenth amendment reads as follows:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person the equal protection of the laws. . . .

Section 5. The Congress shall have power to enforce by appropriate legislation, the provisions of this article.

70. 16 Wall. (83 U.S.) 36 (1872).

ties of national citizenship was rejected. The latter were held to be comparatively few in number, such as the right to protection abroad, the right to visit the seat of government, the right to engage in interstate and foreign commerce; while the fundamental privileges and immunities, such as the right to own property, to pursue one's livelihood and to contract had always been and remained those of state citizenship alone.<sup>71</sup>

This decision on privileges and immunities has remained the law down to the present time. Moreover, in the *Civil Rights Cases*<sup>72</sup> the Court completed the job of arrogating to itself the power given to Congress under the fourteenth amendment, for here it held that only state action was forbidden under the amendment and that Congress could not legislate directly against individuals who practiced discrimination. Thus, in two decisions, sweeping results had been obtained: a broad interpretation of the privileges and immunities clause was thrown out, and the power of Congress to interfere in the internal affairs of the states by legislative action was greatly diminished.

Returning to a further consideration of the *Slaughter-House Cases*, it is significant that four judges dissented. Justice Field maintained that the monopolist character of the legislation rendered it violative of the fourteenth amendment. He declared that the privileges and immunities clause was intended "to give practical effect to the Declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes," which this clause did by converting the fundamental rights of citizenship under any free government to those of United States citizenship, of which there was none more sacred than the right of labor, which the state might regulate for the public health, order and prosperity; but such regulation must apply equally to all and not grant exclusive privileges.<sup>73</sup> Justice Bradley felt that the right to "life, liberty, and the pursuit of happiness," is equivalent to the right to "life, liberty and property," which are "fundamental rights" and can only be taken away by due process of law, that is, "by lawful regulations necessary or proper for the mutual good of all." The particular prohibition of the right to follow a lawful employment deprived a large class of citizens of liberty and property without due process of law as well as the equal protection of the laws. Bradley's opinion, as well as that of Justice Swayne, transferred the emphasis from the privileges and immunities clause to the

---

71. *Id.* at 73-80. Thus, the privileges and immunities of national citizenship remained the same as they were before the adoption of the fourteenth amendment. *Corfield v. Coryell*. Fed. Cas. (No. 3,230) (C.C. Wash. 1823).

72. 109 U.S. 18 (1883).

73. *In re Slaughter House Cases*, 16 Wall. (83 U.S.) 36, 95, 105-06, 110 (1872).



"due process" and "equal protection" clauses.<sup>74</sup> Justice Swayne relied on natural rights equally with Justices Field and Bradley.<sup>75</sup>

The period immediately following the Civil War has been characterized as "the period of restrictive interpretation."<sup>76</sup> The Court was not unconcerned with the protection of vested rights, but it was proceeding with caution. Thus, it refused to define the extent of the due process concept, saying that "there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require. . . ."<sup>77</sup> It was first by *dicta* and then by concurring opinion that due process as a substantive concept came into the law. Thus in *Bartemeyer v. Iowa*,<sup>78</sup> the Court upheld a statewide prohibition act which prohibited the sale of liquor owned at the time the act was passed. Since the case arose in 1870, and the act was passed in 1851, the Court said that it would be absurd to hold that the plaintiff, a retailer of whiskey, would have had whiskey in stock for so long a period. Thus the Court avoided a decision, but it cited *Wynehamer v. People*<sup>79</sup> with a warning that a grave question would be presented under the due process clause if a case should come before the Court which absolutely prohibited the sale of property owned when the legislation was enacted. Furthermore, in *Loan Association v. Topeka*,<sup>80</sup> decided a few months later, the Court made no reference to the due process clause but reverted to general principles to strike down a city ordinance taxing its constituents to provide a bonus for a private concern. Reliance was placed on inherent limitations "which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."<sup>81</sup> Cooley's *Constitutional Limitations* and an array of state decisions were cited. No reference was made to the fourteenth amendment.

In *Walker v. Sauvinet*,<sup>82</sup> in 1872, a controversy was begun which has continued intermittently down to the present time. Before the Civil War, it had been held that the provisions of the Bill of Rights of the federal constitution were binding on the federal government but

---

74. *Id.* at 116, 122.

75. *Id.* at 127.

76. HAINES, *op. cit. supra* note 10, at 145.

77. Davidson v. New Orleans, 96 U.S. 97, 104 (1877).

78. 18 Wall. (85 U.S.) 129 (1873).

79. 13 N.Y. 378 (1856), discussed *supra* nn.66 & 67.

80. 20 Wall. (87 U.S.) 655 (1874). Cf. also Gilpcke v. Dubuque, 68 U.S. (1 Wall.) 175, 206-07 (1863), also decided on general principles.

81. *Id.* at 663-64.

82. 93 Wall. (92 U.S.) 90 (1872).

not on the states.<sup>83</sup> It was now argued that the privileges and immunities protected by the fourteenth amendment included those liberties protected by the Bill of Rights, in this case, trial by jury. The Court rejected this argument, holding that the privileges and immunities of national citizenship as contemplated by the fourteenth amendment did not include the right to trial by jury in the state courts. When "due process" was argued as an additional ground for jury trial, the Court replied: "This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings."<sup>84</sup>

In *Walker v. Sauvinet*, the Court rejected one phase of the historical approach to natural law, thus leaving the states a greater amount of freedom in the field of personal liberties, while it was proceeding to incorporate the historically derived notions of vested rights and liberty of contract into the Constitution as a concurrent phase of the same evolutionary process of interpretation. Though repeatedly challenged, the Court has continued to adhere to this position down to the present time.<sup>85</sup> The tendency has been to reject the so-called procedural safeguards of the Bill of Rights and to hold the "basic principles" thereof as protected by the amendment, but the Court has done this "by a process of absorption."<sup>86</sup> Moreover, it has continued to act under the "due process" clause rather than under the "privileges and immunities" clause. Thus, it has held that the right to trial by jury, indictment by grand jury, the privilege against self-incrimination and at least a certain type of double jeopardy is not protected by the fourteenth amendment. It has held that freedom of speech, assembly, press and religion are protected. On two procedural concepts it has crossed the line and allowed protection. Thus it has upheld the right to counsel and has forbidden conviction upon illegally obtained evidence, at least in extreme cases.

Perhaps the best statement of the Court's position has been made by the late Justice Cardozo, in the *Palko Case*.<sup>87</sup> To determine whether a right asserted against a state is within the protection of the fourteenth amendment, the Court looks for a "rationalizing principle" as the basis for inclusion or exclusion of the claim as a constitutional right entitled to protection. The test is whether or not the claimed right is "of the very essence of a scheme of ordered liberty"; whether its denial

---

83. *Barron v. Baltimore*, 7 Pet. (32 U.S.) 243 (1833).

84. *Walker v. Sauvinet*, 92 U.S. 90, 93 (1872).

85. *Adamson v. California*, 322 U.S. 46 (1946); *Wolf v. Colorado*, 338 U.S. 25 (1949); and *Rochin v. California*, 342 U.S. 165 (1952). What was formerly deemed a settled matter, however, has been reopened to controversy.

86. *Palko v. Connecticut*, 302 U.S. 319 (1937).

87. *Id.* at 319, *passim*. See also: *Twining v. New Jersey*, 211 U.S. 79 (1908).

would "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' . . ."<sup>88</sup>

In *Davidson v. New Orleans*,<sup>89</sup> the Court unanimously sustained a city assessment on certain lands to pay for the drainage of nearby swamps. Justice Miller, speaking for the Court, indicated that historically due process was only a procedural concept, requiring only "a fair trial in a court of justice, according to the modes of proceeding applicable to such case."<sup>90</sup> But he went on to warn that while the barons of the *Magna Carta* may not have had in mind to protect themselves from acts of Parliament when they first uttered the phrase, times had changed prior to its incorporation into the Constitution of the United States in 1868; that it must have a broader meaning now, and the Court would not permit the states to go to any extent in "the invasion of private rights" under "the forms of state legislation."<sup>91</sup> Justice Bradley, in a concurring opinion, which was to become the majority view a few years later, held that the majority had unduly limited the scope of due process of law, that the object of the taking of property must be considered, and it must not be "arbitrary, oppressive, and unjust."<sup>92</sup>

In *Butchers' Union Co. v. Crescent City Co.*,<sup>93</sup> the Court upheld the right of Louisiana to limit the privileges of the previous monopoly on slaughtering by chartering a competitor. The majority had said again that it is all right, but this time the concurring opinions of Justice Field and Justice Bradley were on the affirming side, which gave them vastly more weight and prestige. Moreover, Justice Bradley was joined by two new judges in his reiteration of his concept of due process of law.

Justice Field's views contained more of the eighteenth century natural rights notions, which he considered to be privileges and immunities of national citizenship. He expounded the inalienable rights of the *Declaration of Independence* and cited Adam Smith's *Wealth of Nations*. He stated that:

the property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable . . . and to hinder his employing his strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property.<sup>94</sup>

---

88. 302 U.S. 319, 325 (1937).

89. 96 U.S. 97 (1877).

90. *Id.* at 105.

91. *Id.* at 102.

92. *Id.* at 104.

93. 111 U.S. 746 (1883).

94. *Id.* at 756.

He then concluded that the right to pursue an ordinary trade is a privilege of national citizenship and "an essential element of that freedom which they [American citizens] claim as their birthright."<sup>95</sup>

Justice Bradley's position was safer from the conservative point of view. Federal protection of vested rights was afforded in the same manner in which it had been introduced and fortified in the state courts in the pre-Civil War period, and in the manner for which Judge Cooley argued in his famous treatise. Yet this was done without enlarging the scope of the privileges and immunities clause, as Justice Field's position would have required, thus re-opening the way to abolish our dual system, a way which had been closed by the Court in the *Slaughter-House Cases*.

Justice Bradley's conception of liberty, now sharpened into "liberty of pursuit," as the doctrine of an affirming opinion was followed in New York and then in a succession of other states.<sup>96</sup> It was broadened into the concept of liberty of contract, a by-product of natural rights and the corner-stone of *laissez-faire*.

Dean Pound has carefully considered the decisions dealing with liberty of contract, with particular emphasis on the history of the doctrine in the state courts. To sum up, these decisions insisted upon the inviolability of freedom to contract, ignoring the unequal position of the parties, the social problems which had come to exist and the interest of the state in creating remedies for unhealthy situations. The decisions tended to hold legislation falling in the following categories invalid: (1) legislation forbidding employers from interfering with membership of employees in labor unions; (2) legislation providing for the manner of weighing coal in order to fix the compensation of miners; (3) legislation against company stores, requiring employers to pay wages in money; (4) legislation as to hours of labor where males are concerned, unless clearly dangerous to health, and in one case of females and (5) legislation prohibiting employees from releasing their employers in advance from liability for personal injuries.<sup>97</sup>

Though warnings were repeatedly issued in the Supreme Court,<sup>98</sup> it was actually in the state courts that the doctrine of liberty of contract began on a broad nation-wide basis. The great excesses of the national Court came afterwards, and it is probably true that the extent to which the state courts had adopted liberty of contract and other substantive

95. *Ibid.*

96. Cf. CORWIN, *op. cit. supra* note 67, at 136-37 and cases cited there.

97. Pound, *Liberty of Contract*, 18 YALE L.J. 454, *passim*, and particularly at 481-82 (1909).

98. Thus, in *Mugler v. Kansas*, 123 U.S. 623 (1887), the Court upheld a state prohibition act under the police powers, with a warning not to go too far.

due process notions was as much a factor in the later decisions of the Supreme Court as its own prior decisions and *dicta*.

Though the notion of the right of a citizen to pursue a common calling is undoubtedly sound public policy, the Court, now dominated by judges indoctrinated with the new *laissez-faire* Philosophy, went on from that position as a judicial premise to hold that this concept included the right to make all proper contracts in relation thereto.<sup>99</sup> In time, the concept would come to mean that a state could not outlaw a private employment agency for gain<sup>100</sup> or regulate the weight of bread sold to the public by bakeries.<sup>101</sup> In 1905, it would mean that a state could not regulate the hours of labor in bakeries;<sup>102</sup> in 1915, that a state could not prevent an employee and his employer from signing a "yellow dog" contract<sup>103</sup> and in 1923, that a woman could not be prohibited from working for less than a living wage.<sup>104</sup> The following language is illustrative of the legal reasoning of the Court in liberty of contract cases:

The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. . . . In all such particulars, the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.<sup>105</sup>

The story of rate-fixing was concurrently developing along similar lines. In the period of restrictive interpretation, the Court held this to be a legislative function, for the abuse of which "the people must resort to the polls, not the courts."<sup>106</sup> Yet, Justice Field, in his dis-

99. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). The defendant had been convicted by the courts of Louisiana for violating its law against making contracts of insurance with corporations which had not qualified to do business in Louisiana. The contract was made outside of Louisiana but covered property located in Louisiana. The Court reversed the conviction.

100. *Adams v. Tanner*, 244 U.S. 590 (1917).

101. *Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924).

102. *Lochner v. New York*, 198 U.S. 45 (1905).

103. *Coppage v. Kansas*, 236 U.S. 1 (1915).

104. *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); also *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

105. *Adair v. United States*, 208 U.S. 161, 174-75 (1907). In this case, the Court held that a congressional act making it a crime to discharge an employee because of membership in a labor union by a carrier engaged in interstate commerce was unconstitutional as an invasion of personal liberty and therefore a deprivation of due process of law.

106. *Munn v. Illinois*, 94 U.S. 113, 134 (1876).

senting opinion, maintained that the doctrine of the majority was subversive of both the rights of liberty and property.<sup>107</sup> Then the Court began its qualification, as it proceeded to lay out the extent of the substantive due process concept generally. First, by *dictum*: "It is not to be inferred that this power of limitation or regulation (by the state) is itself without limit." The state cannot go to the limit of "confiscation."<sup>108</sup> Then, by making the *dictum* into a rule of law, in the course of which it declared: The "question of reasonableness" is "eminently a question for judicial investigation, requiring due process of law for its determination."<sup>109</sup> The doctrine reached its culmination in *Smythe v. Ames*,<sup>110</sup> where the Court laid down the standards by which "reasonableness" should be tested and further held that the Court itself would ultimately decide whether the test had been properly applied. While the Court today refuses to say what test the rate-making body should apply, it has steadfastly adhered to the "rule of reasonableness."<sup>111</sup> Even outside of the area covered by the Bill of Rights, due process as a substantive concept still remains with us.

On the juristic level, these decisions can only be explained as being the outcome of the application of natural law theory, fortified by the conceptual ideal of liberty of contract as drawn from the theories of the historical school, in a period when the socialization of the law was being initiated to meet the needs of the time and place. As a result, few juristic theories have been more barren than the eighteenth century natural law in the hands of American judges in the late nineteenth and early twentieth century.<sup>112</sup>

## X.

### CONCLUSION: SOME IMPLICATIONS FOR THE PRESENT

The old natural law did great work in its day, but it lingered on, slowing progress, when it had served its purpose and had become an anachronism, out of harmony with the thought and needs of the times. It did not reach its full bloom in our constitutional decisions until after Kant had dealt it the death blow in juristic thought on the Continent of Europe, but it hung on in our courts until well into the twentieth century, after the stage of maturity of the law had achieved its purpose of organization and synthesis of the received materials of the stage of

---

107. *Id.* at 136 ff.

108. *Stone v. Farmers Loan and Trust Co.*, 116 U.S. 307, 331 (1885).

109. *Chicago, etc. Ry. Co. v. Minn.*, 134 U.S. 418, 458 (1889).

110. 169 U.S. 466 (1898).

111. *Cf. ROTSCHAEFER, THE CONSTITUTION AND SOCIO-ECONOMIC CHANGE* 163 ff. (1948).

112. Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591, 611 (1910).

equity and naturalization of the law. Its remnants are yet to be seen as we proceed with a new stage of legal growth and development, sometimes described as the stage of socialization of the law — as we pass from a society characterized by contractual relations, with free individual self-assertion as the end of law, to a new relational society, conceived in terms of new rights and duties, or, to reverse the famous phrase of Sir Henry Maine, from contract to status.

What does the history of the old natural law have to teach us at this time? Since we are still close to it, our answers can only be tentative and partial. Yet, if the past is well considered, if our lessons are well learned, our conclusions can help us to understand the present and chart our course for the future. We will venture a few general conclusions. The demise of the old natural law teaches us, among other things, the following: First, that we do not have all the answers and hence cannot be dogmatic. For example, neither the old natural law nor any other set of values which have seemed to meet the jural needs of the time and place can be accepted as the ultimate reality or the final answer for all time. Second, that the universal element requires careful adaptation to the concrete case, and the task of adaptation must be approached with humility as well as responsibility in choosing between alternatives — that universals cannot solve the “little problems” — they can at best provide the general framework. Third, that reason and experience together are not enough. These items must be adapted to take into account the developments of legal history and to avoid its mistakes. This will require the acceptance of moral responsibility for some degree of freedom of choice, together with flexibility to make that freedom meaningful, and courage to leap into the future when the framework of the past continued into the present is inadequate to meet the needs of the present and the anticipations of the future. This in turn will require the courage to venture into uncharted seas. Fourth, the study of the old natural law, in the context of legal history, gives us greater understanding of the judicial tasks which lie ahead and how these can be achieved with better results than has often been true in the past, particularly with regard to the law’s keeping up or moving ahead. Fifth, that on our individual levels of understanding and responsibility, we must accept as a part of the jural reality each of the above indicated conclusions as factors in the decision of concrete cases as well as in the over-all evaluation of the legal picture.

Whether we believe in universals *sub specie aeternitatis* or only as presuppositions of the civilization of the time and place, or whether we do not concern ourselves with the broader generalities, we must nevertheless recognize that we do not have all the answers and that

the tried juristic methods are factors with which we must reckon. This in turn will give us the necessary flexibility of a philosophical approach to develop an eclectic method in the pragmatic sense, whatever our particular intellectual bias, so that we may approach legal problems with substantial freedom to choose from among competing principles, as we decide concrete cases through the application of reason and experience. Put another way, the natural law facet of the prism has given us greater depth of perspective in which to view the jural realities. And, if we include in our method the application of the new learning of our times, we may expect to achieve a nearer approximation to social and individual justice, even in complex modern society, than has heretofore been possible through law.

It has been concluded by a distinguished professor that the judicial language of the English chancellors invoking natural justice was to a large extent rhetorical, and this conclusion seems justified.<sup>113</sup> Yet, the natural law thinking which permeated the ideological environment of these judges is an undeniable fact. Their legal thinking was a product of the more general and, hence, universal legal thought of the times, though in their day-to-day tasks they were faced with the decision of concrete cases, in which they had to adapt the unsatisfactory received materials of the strict law to the needs of a larger and more dynamic society. The legal thinking of the American judges of the formative era of our law was a product of more conservative natural law thinking; the product of the adaptation of the received eighteenth century natural law to the task of incorporating the received legal materials into our law. Yet, in accomplishing this task, the judges made over our law, from the received materials of the English common law, to meet the needs of a rural agricultural society at a time when we were in transition to an urban industrial society. The result was a clash of values which caused trouble down to our own times. The judges of the formative era lived in a stage of legal development which has been described as the period of maturity of the law, when the stabilization of a less amorphous legal system was deemed essential. They also lived in an age when emphasis upon free individual self-assertion was at the height of its acceptance as a legal dogma, without regard to the specific difficulties which men with theoretical freedom of choice encountered. Moreover, the best legal thought of the time was in agreement as to "the futility of conscious effort to improve the condition of humanity through law,"<sup>114</sup> though they reached this posi-

113. PATTERSON, *JURISPRUDENCE* 372 (1953), citing STONE, *THE PROVINCE AND FUNCTION OF LAW* Ch. VIII §§ 14 & 15 (1946).

114. POUND, *op. cit. supra* note 9, at 151.



tion by diverse routes and from diverse starting points.<sup>115</sup> These were perhaps the main reasons why the law may be said to have failed to solve the social problems delegated to it in a manner considered satisfactory according to the best thought of the time. This resulted in an incongruity on the one hand between the law and society; and on the other, between the law in books and the law in action.

The break-down of the natural law support as a source of strength for the decisional law of that era did not come, however, without much travail, the forces of change struggling against those of inertia and established canons of value. It did not arrive until the advent of our own times, when the thinking of the prior era was faced with a serious challenge and ultimate, if long over-due, repudiation. The challenge came from the new ideological schools, which had achieved new insights into legal theory as a result of a complex of factors that seemed to indicate that the universal element, if any, was far less all pervasive — or at least less spelled out in detail — than had been formerly supposed. On the day-to-day level, it came from a perception that judicial decisions, the rationalization (and hence ultimate ideological justification) of which was based on natural law, were no longer meeting the needs of the civilization of the time and place. The times had changed, and with this change came new needs and hence new problems, the product of reconciling stability with change. It was necessary to develop new law to meet the new needs, and this law must be buttressed by harmonious legal theory. For a time, such theory lagged, with disastrous results in our constitutional decisions.

On a lesser level, similarly unsatisfactory results were reached in the areas of statutory interpretation and common law judicial decision. Yet, the change in legal theory did come, and it is not too much to say that it has helped to bring the law into more active participation in meeting society's needs and desires. Hence, we move from a society of substantial abstract freedom to one of substantial social control through law, yet a kind of law which attempts to achieve a greater equality in fact where the theoretical equality through freedom failed in practice. It might be said that the law is now placing greater emphasis upon the social interest in the individual life, through the creation of greater opportunity. In this way, the law is now endeavoring to meet the social needs of our society on a new level — where such needs were formerly non-existent, could not be met or were handled by other agencies of social control. And it is not too much to hope that forward-looking legal theory may lead in maintaining flexibility, in pointing the way to future growth, to greater self-realization

---

115. See text following note 52 *ante*.

through equality of opportunity, thus enabling our law to continue to meet the needs of the time and place in the more dynamic society which is developing at an ever accelerating pace. This means, among other things, that we now recognize that a static concept of natural law as universal, eternal and immutable cannot meet the needs of the changing, dynamic society in which we live. This is well illustrated in the area of constitutional law, where the decisions are interpretations of a constitution which must last for the ages. The result is that natural law as we have known it in our past is dead, though the legal method of a new era of growth and uncertainty can draw its ideological strength from a new legal idealism, different from, but bearing some analogy to, the idealistic eras of the past, the experience of Greek reason in the hands of the Roman jurists and the right reason of the Enlightenment in the hands of the great chancellors of the formative era of our system of equity. Yet, such development will be strengthened by the knowledge that what Pound has termed "the positive natural law" is not inevitable and that it might be something very different from what it actually is decreed to be by the particular tribunal. Hence, the essential humility in approaching one's task gives one courage to accept alternatives, and the historic continuity with the past permits innovations that bear good fruit. The result is that experience sustained by congruent legal theory can add new strength to the law in the course of its new development. This is actually taking place. It cannot be told to what extent this phenomena is controlled by some kind of determinism, yet modern experience and reason lead us to believe that if deterministic factors are present in the area of social control through law, they cannot be narrow or inflexible. In fact, any such determinism might be said to be merely the social framework which creates the felt needs with which the law must work to accomplish the value ideals of the age.

Eclecticism should provide us with the most suitable theories and practices, and the empirical tradition should enable us to put them into execution. In carrying on this task of the law, our classical natural law heritage, which we have obviously outlived, will furnish important guides to social insight, thereby enabling us to improve our methods and increase our understanding of what we want to do and how best to go about it. In carrying out this task, we must insist upon a frame of reference in which there is flexibility or room for change. We must always keep in mind the compelled relationship of law with life in the concrete world and of the ever present necessity for and urgency of the solution of the day-to-day problems according to the felt needs (values) of the times. Finally, we must act when necessary to keep the law in balance with life for the solution of these problems as effectively as

possible within the frame-work of the democratic processes. Thus, we can confidently face the future with the law as perhaps the chief instrument of social control.

If we are, perchance, on the threshold of a brave new world, it is not one with the initial freshness of that of the Greeks. It is not without antecedents in history. Hence, we shall profit much from what has gone before us if we face the future with an assurance grounded in reason and experience. This will require: (1) the will to achieve it; (2) some measure of success to beget confidence; and (3) the constant re-evaluation of history in the light of current needs. These things work together for the progress of society through the instrumentalities which it utilizes — here, law. If successful, we may again achieve the enthusiasm of the Greeks, and an even higher level of juristic accomplishment than has heretofore come to pass.